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BRIEFING

DANGERS OF NOT OBSERVING THE LCIA ARBITRATION RULES

MARCH 2018

- ENGLISH HIGH COURT FINDS REQUEST FOR ARBITRATION FOR DISPUTES UNDER TWO SEPARATE CONTRACTS INVALID
- ALSO GIVES USEFUL GUIDANCE ON TIMING FOR JURISDICTIONAL OBJECTIONS UNDER THE LCIA ARBITRATION RULES 2014

A recent English High Court case (***A v B [2017] EWHC 3417 (Comm)***) has demonstrated the dangers of not strictly observing the LCIA Arbitration Rules.

A and B entered into two contracts for the sale of crude oil. Both contracts were governed by English law and contained LCIA arbitration clauses. A dispute arose under both contracts and on 23 September 2016, B filed with the LCIA a single request for Arbitration claiming payment of the full purchase price for the crude oil under both contracts.

A objected to the jurisdiction of the Tribunal because it said that B's request for Arbitration was invalid. A contended that the request was invalid because it did not identify either the dispute or arbitration agreement to which it related.

The objection was made shortly before the date on which A's Statement of Defence was due and the Statement of Defence was served by A on that date but without prejudice to its objection to the jurisdiction of the Tribunal.

The Tribunal made a partial award on jurisdiction (Award) dismissing A's objection on the grounds that it was made too late. A then commenced proceedings in the English High Court seeking an order overturning the Tribunal's decision.

"ARTICLE 1 OF THE LCIA RULES STATES THAT: "*ANY PARTY WISHING TO COMMENCE AN ARBITRATION UNDER THE LCIA RULES... SHALL DELIVER TO THE REGISTRAR OF THE LCIA COURT... A WRITTEN REQUEST FOR ARBITRATION...*" (EMPHASIS ADDED)."

Was B's Request for Arbitration Valid?

Article 1 of the LCIA Arbitration Rules 2014 ("LCIA Rules") states that: *"Any party wishing to commence an arbitration under the LCIA Rules... shall deliver to the Registrar of the LCIA Court... a written request for arbitration..."* (Emphasis added).

B contended that notwithstanding the fact that Article 1 refers to a single arbitration being commenced by a single request, the request it had filed with the LCIA validly and effectively commenced two separate arbitrations in respect of both contracts.

B relied on *The Biz [2011] 1 Lloyd's Rep 688* where it was held that one notice was valid to commence arbitrations in respect of claims under ten bills of lading.

B also said that Article 1 of the LCIA Rules should be interpreted in accordance with section 61 of the Law of Property Act 1925 ("1925 Act"). Section 61 of the 1925 Act lays down presumptions for interpreting contracts, not limited to those concerning property. It applies to *"all deeds, contracts, wills, orders and other instruments"* coming into operation on or after 1 January 1926 and the presumptions operate *"unless the context otherwise requires".* Section 61(c) of the 1925 Act states that it is to be presumed that *"the singular is to include the plural and vice versa",* which according to B meant that the word *"arbitration"* should be presumed to include *"arbitrations".*

The court found that B's request for Arbitration was invalid for the following reasons:

1. The LCIA Rules clearly treat a single request as giving rise to a single arbitration, the payment of fees for one arbitration and the formation of a single arbitral tribunal. The situation in *The Biz* was different because *"that was a case where no arbitral rules were applicable, let alone the LCIA Rules".*

"THE COURT SAID "*IT IS (A) INCONCEIVABLE THAT THE LCIA RULES COULD BE READ AS PERMITTING A PARTY TO PAY ONLY ONE FEE WHEN COMMENCING MULTIPLE ARBITRATIONS AND (B) UNDOUBTEDLY IMPERMISSIBLE TO READ THEM AS GIVING RISE TO CONSOLIDATED PROCEEDINGS WITHOUT THE CONSENT OF ALL PARTIES".*"

2. The fact that Article 22.1(ix) of the LCIA Rules specifically gives an arbitral tribunal (once formed) the power to consolidate an arbitration with one or more other arbitrations into a single arbitration but only where the parties agree, makes this interpretation conclusive.
3. If B was right about the validity of its request, it had to follow that B was only obliged to pay one registration fee and that the Tribunal was appointed in respect of both arbitrations. The court said *"it is (a) inconceivable that the LCIA Rules could be read as permitting a party to pay only one fee when commencing multiple arbitrations and (b) undoubtedly impermissible to read them as giving rise to consolidated proceedings without the consent of all parties".*
4. For the purpose of section 61 of the 1925 Act, the context of the LCIA Rules requires that the term *"arbitration"* in Article 1.1 should not be read as including the plural. Even if section 61 is applied to Article 1.1 so that *"an arbitration"* includes *"arbitrations"* it is entirely clear that the result could not be the consolidation or concurrent hearing of more than one arbitration without the agreement of all parties, as specifically required by section 14 of the Arbitration Act 1996 ("1996 Act").

Was the jurisdictional objection made too late?

B's secondary argument was that even if its request was invalid, A had in any event lost the right to object to the Tribunal's jurisdiction because it had not filed its

objection as soon as possible from receipt of the request that it believed was misconceived.

B had filed its request for Arbitration on 23 September 2016 but A had not made its jurisdictional objection until several months later on 24 May 2017. A had already served its response on 31 October 2016 in which it had not expressly objected to the Tribunal's jurisdiction, but had simply reserved in general terms its rights.

Article 23.3 of the LCIA Rules provides that *"An objection by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be raised as soon as possible but not later than the time for its Statement of Defence... The Arbitral Tribunal may nevertheless admit an untimely objection as to its jurisdiction… if it considers the delay is justified in the circumstances".* (Emphasis added)

"THE WORDS "*AS SOON AS POSSIBLE*" IN ARTICLE 23.3 WERE THERE TO EXCLUDE "*UNTIMELY OBJECTIONS*" BUT NOT TO INTRODUCE A NEW AND DRAMATICALLY DIFFERENT REGIME FROM SECTION 31 OF THE 1996 ACT."

The Tribunal took the view that the words *"as soon as possible*" in Article 23.3 meant what they say and that the need to raise an objection promptly was particularly acute where (as in this case) a limitation period may expire. The Tribunal went on to say that where a Respondent knows of an objection from the moment it receives the Request, the words *"as soon as possible"* means by the service of the response i.e. 28 days.

The Tribunal concluded that A should have raised its objection to jurisdiction at the latest by 31 October 2016, the date of its response – and its failure to do that was unjustifiable.

The court reached a different conclusion to the Tribunal by reference to its interpretation of the mandatory provisions of the 1996 Act, including section 31. The court said *"it is necessary to start with those provisions, not just because they are mandatory, but also because it is highly unlikely that the LCIA Rules were intended to have an effect which materially diverges from such provisions".*

Section 31(1) of the 1996 Act provides that: "*An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction".*

By reference to the equivalent provision in the UNCITRAL Model Law of International Arbitration (article 16(2)), the court found that the *"first step in the proceedings to contest the merits"* means the submission of the Statement of Defence.

Section 31(2) of the 1996 Act deals with objections during the course of proceedings and the court pointed out that in stark contrast to section 31(1), section 31(2) does require an objection to be made "*as soon as possible*".

The court said that the *"reason for the distinction seems obvious: an objection made during the course of proceedings, possibly in the middle of a hearing, that a tribunal is exceeding its authority plainly must be made at once, so that an otherwise validly appointed tribunal can address the concern and make adjustments if appropriate. Objections to jurisdiction at the outset, relating to whether the tribunal has jurisdiction at all, are more fundamental and unlikely to have immediate consequences which cannot be remedied".*

Based on this interpretation and its views on the interpretation of section 73 of the 1996 Act (dealing with the loss of the right to object), the court found that the *words "as soon as possible"* in Article 23.3 were there to exclude *"untimely objections"* but not to introduce a new and dramatically different regime from section 31 of the 1996 Act for raising jurisdictional objections before the filing of the Statement of Defence.

"EVEN WHERE THERE IS NO LIMITATION ISSUE, A CLAIMANT WHO FAILS TO FILE SEPARATE REQUESTS STANDS TO SUFFER SIGNIFICANTLY FROM THE INEVITABLE DELAY AND THE WASTE OF COSTS ARISING FROM THE NEED TO COMMENCE FRESH ARBITRATION PROCEEDINGS."

As such, the court decided that A had not lost the right to object to the Tribunal's jurisdiction as its objection had been made not later than the time for its Statement of Defence.

Lessons to be learnt

It is not uncommon for commercial arrangements to be documented by and structured through multi contracts including financing and construction arrangements.

If a dispute arises across more than one contract and those contracts provide for arbitration under the LCIA Rules, this case makes it clear that separate requests must be filed per contract referring in each case to the terms of the relevant arbitration agreement and the nature of the dispute. The consequence of failing to do just that can be disastrous for a Claimant if a limitation period is about to expire in that the Claimant may lose the opportunity to pursue its claim altogether. Even where there is no limitation issue, a Claimant who fails to file separate requests stands to suffer significantly from the inevitable delay and the waste of costs arising from the need to commence fresh arbitration proceedings.

This case is also a useful authority on the interpretation of Article 23.3 of the LCIA Rules and the approach to interpreting the provisions of the LCIA Rules alongside the mandatory provisions of the 1996 Act. While the court's decision confirms that Article 23.3 of the LCIA Rules does not create a stricter regime for raising jurisdictional objections, the safest approach remains to be to raise jurisdictional objections as soon as possible.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

CHARLOTTE BIJLANI
Partner
Dubai

T +971 4 278 2300
D +971 4 278 2308
M +971 55 1154791
cbijlani@wfw.com

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